Supreme Court, U.S.
FILED

(1)

93 2032 JUN 15 1994

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

IN RE:

CLAIR B. KINTER, an individual,
ROYDEN E. KINTER, an individual,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DINA G. McINTYRE
Counsel of Record
McINTYRE & McINTYRE
1609 Lawyers Building
Pittsburgh, Pennsylvania 15219
(412) 391-9422
Attorney for Petitioners

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

59 pp
4.50

QUESTIONS PRESENTED FOR REVIEW

I. The assessments of tax and interest complained of, made 11 to 14 years after plaintiffs' returns were timely filed, are barred by the 3 year Statute of Limitations. The Forms 872A signed by plaintiffs were not effective to extend the Statute of Limitations in the circumstances of this case because:

(a) *No Waiver:* There was no waiver of the bar of the Statute of Limitations. (Negatived by the Courts below).

(b) *Congressional Policy:* Where plaintiffs did not know that they had signed indefinite waivers of the Statute of Limitations or that there were unresolved issues outstanding after a stipulated decision in the Tax Court; where the IRS thereafter lost plaintiffs' files for more than twice the period of limitation, and then assessed $150,452.90 in taxes and $334,196.66 in interest against plaintiffs long after they no longer had the records or recollection to successfully defend against the assessments, the use of 872As to make the assessments complained of in the circumstances of this case violated Congressional policy back of the Statute of Limitations and cannot support the assessments complained of. (Not addressed by the Courts below).

II. If the Forms 872A effected a waiver of the bar of the Statute of Limitations, the assessments complained of were made in violation of the covenant of good faith and fair dealing implied in the 872As, and therefore do not fall within any extension of time afforded by them. (Not addressed by the Courts below).

III. The Courts below erred in failing to adjudicate plaintiffs' claim that the assessments of $49,384 in additional taxes and $123,228.41 in interest which were based on alleged unreported income for the 1975 tax year for all Kinters were incorrect as a matter of fact and law. (Not addressed by the Courts below).

IV. The IRS is estopped from making the assessments of MCM related tax and all interest complained of, brought about by the IRS's own delay. (Negatived by the Courts below).

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

Clair Kinter and Royden Kinter, Appellants,

vs.

United States of America, Appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS ii

TABLE OF AUTHORITIES..... v

UNOFFICIAL REPORTS OF OPINIONS IN THIS CASE 1

STATEMENT OF JURISDICTION..... 1

STATUTES, REGULATIONS AND REV. PROCS..... 1

STATEMENT OF THE CASE 1

ARGUMENT..... 10

I. The assessments of tax and interest complained of, made 11 to 14 years after plaintiffs' returns were timely filed, are barred by the Statute of Limitations. The Forms 872A signed by plaintiffs were not effective to extend the Statute of Limitations in the circumstances of this case because:

(a) *No Waiver*..... 11

(b) *Congressional Policy* 20

II. The assessments complained of were made in violation of the covenant of good faith and fair dealing implied in the 872As, and therefore do not fall within any extension of time afforded by them 22

III. The assessments of $49,384 in additional tax and $123,228.41 in interest based on alleged unreported income for the 1975 tax year were incorrect as a matter of fact and law 24

IV. The IRS is estopped from making the assessments of MCM related tax and all interest complained of, caused by the IRS's own delay 28

Appendix:

Judgment Order of the United States Court of Appeals Dated March 17, 1994 ..... A1

Amended Memorandum Order of the District Court Dated June 3, 1993 ..... A3

Magistrate's Order of Court Dated June 2, 1993 Amending Magistrate's Report Dated April 21, 1993 ..... A4

Memorandum Order of the District Court Dated May 24, 1993 ..... A6

Report of the Magistrate Dated April 21, 1993 ..... A7

26 U.S.C. Section 6501(a) and (c)(4) A14

Rev. Proc. 79-22 ..... A15

26 CFR 1.451-1(a) A19

IRS Forms 872A A21

TABLE OF CITATIONS

CASES:

UNITED STATES SUPREME COURT

D.H. Overmyer Co. Inc. of Ohio v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 782, 31 L.Ed.2d 124 (1972) 11

Florsheim Bros. Co. v. U.S., 280 U.S. 453, 466, 50 S.Ct. 215, 74 L.Ed. 542 (1930) 10,11

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 2001-2002, 32 L.Ed.2d 556 (1972) 11

Heckler v. Community Health Services, 467 U.S. 51, 81 L.Ed.2d 42, 104 S.Ct. 2218 (1984) 28,29

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 11,12

Stange v. U.S., 282 U.S. 270, 276, 51 S.Ct. 145, 75 L.Ed. 335 (1931) 10

CIRCUIT COURTS OF APPEAL, COURT OF CLAIMS AND FEDERAL DISTRICT COURTS

Anastasato v. CIR, 794 F.2d 884 (3 Cir. 1986) 27

Boone v. Kerr-McGee Oil Industries, Inc., 217 F.2d 63, 65 (10 Cir. 1954) 22,23

Cirillo v. Arco Chemical Co., 862 F.2d 448 (3 Cir. 1988) 11,12

Commerce International Company, Inc. v. United States, 338 F.2d 81, 85 (US Ct. Cl. 1964) 22

Community Health Services v. Califano, 698 F.2d 615 (3 Cir. 1983), revs'd. sub nom. *Heckler v. Community Health Services*, 467 U.S. 51, 81 L.Ed.2d 42, 104 S.Ct. 2218 (1984) 28

Coventry v. U.S. Steel, 856 F.2d 514, 521-525 (3 Cir. 1988) 11,12,13,17

DeCavalcante v. CIR, 620 F.2d 23 (3 Cir. 1980) 27

Denise Coal Co. v. CIR, 271 F.2d 930 (3 Cir. 1959) 3

Erie Telecommunications, Inc. v. Erie, 853 F.2d 1084, 1094-1096 (3 Cir. 1988) 11

Gatlin v. CIR, 754 F.2d 921 (1985) 27

Gerardo v. CIR, 552 F.2d 549 (3 Cir. 1977) 27

Greylock Mills v. CIR, 31 F.2d 655 (2 Cir. 1929) 17

Inola Machine & Fabricating Co. v. Farmers New World Life Ins. Co., 631 F.2d 712, 715 (10 Cir. 1980) 12

Interstate Fire Ins. Co. v. U.S., 215 F.Supp. 586 (E.D. Tenn. 1963) 28

MacDonald v. Winfield Corporation, 93 F.Supp. 153, 163 (E.D. PA 1950), *aff'd.* 191 F.2d 32 (3 Cir. 1951) 23

McManus v. CIR, 65 TC 197, 208 (1975) *affd.* 583 F.2d 443 (9 Cir. 1978) *revs'd. John v. US*, 951 F.2d 232 (9 Cir. 1991) 17,18

Munter v. Lankford, 127 F.Supp. 630 (D.C. Dist. 1955) 16,20

NCNB Nat'l Bank of N. Carolina v. Tiller, 814 F.2d 931, 938 (4 Cir. 1987) 12

Noel v. Baskin, 131 F.2d 231 (DC Cir. 1942) 16,20

Panther Rubber Mfg. Co. v. CIR, 45 F.2d 314 (1 Cir. 1930) 12

Pictorial Printing Co. v. CIR, 38 F.2d 563, 565 (7 Cir. 1930) 17,18

Revere Copper & Brass v. U.S., 3 F.Supp. 157, 159-160 (Ct. Cl. 1933) 17

Richardson v. Lucas, 741 F.2d 753, 757 (5 Cir. 1984) 12

Stenclik v. CIR, 907 F.2d 25 (2 Cir. 1990) 18,19,21,22

St. John v. United States, 951 F.2d 232 (9 Cir. 1991) 18

Sun Oil v. CIR, 562 F.2d 258, 262 (3 Cir. 1977) 15

Tonkonogy v. U.S., 417 F.Supp. 78 (SDNY 1976) 28

Tymshare Inc. v. Covell, 727 F.2d 1145, 1152-1153 (DC Cir. 1984) 23

U.S. v. Asmar, 827 F.2d 907 (3 Cir. 1987) 28

US v. Walton, 909 F.2d 915 (6 Cir. 1990) 27

Wall v. CIR., 875 F.2d 812 (10 Cir. 1989) 18,19,21,22

UNITED STATES TAX COURT

Estate of Camara v. CIR, 91 T.C. 957, 959 (1988) 11,18,19,21,22

BOARD OF TAX APPEALS

Ethel D. Co., 27 BTA 25, 27-28 (1932) 17

Farmers Union State Exchange, 30 BTA 1051, 1067 (1934) 17

Nathan Loser v. CIR, 27 BTA 601, 604 (1933) 17

CONSTITUTION AND STATUTES

26 U.S.C. Section 6501 1,19

26 U.S.C. Section 6501(a),(c)(4) 10,17,20

26 U.S.C. Section 6601(e)(1) 21

26 U.S.C. Section 6662 21

26 *U.S.C.* Section 7422(a) 1,9

28 *U.S.C.* Section 1254(1), 1291, 1331, 1346(a)(1), ... 1

13 *PA.C.S.* Section 2316 16

Uniform Commercial Code, Section 1-203 (1978) 22

REGULATIONS AND REVENUE PROCEDURES

26 C.F.R. Section 1.451-1 1

Rev. Proc. 79-22, Sections 2.01, 2.02 1,23

Rev. Proc. 79-22, Sections 2.03 21,23

TEXTS AND OTHER AUTHORITIES

Restatement, Contracts 2d, Section 205 22

1 Williston on Contracts, (3d ed.) Section 183 20

Uniform Commercial Code 13 Pa.C.S. Section 2316.. 16

UNOFFICIAL REPORTS OF OPINIONS IN THIS CASE

Judgment Order of the Court of Appeals for the Third Circuit at No. 93-3367 (Appendix at pages A1-A2).

Order of the District Court at D.C. Civil Action 91-396 (Appendix at page A6).

Report of the District Magistrate at D.C. Civil Action 91-396 (Appendix at pages A7-A13).

STATEMENT OF JURISDICTION

Judgment Order of the Court of Appeals was entered on March 17, 1994. The jurisdiction of the United States Supreme Court to entertain this Petition for Writ of Certiorari is based on 28 *U.S.C.* Section 1254(1).

STATUTES, REGULATIONS AND REVENUE PROCEDURES

26 U.S.C. Section 6501 (Appendix at page A14).

Rev. Proc. 79-22 (Appendix at pages A15-A18).

26 CFR 1.451-1(a) (Appendix at pages A19-A20).

STATEMENT OF THE CASE

Procedural Statement of the Case.[1] This appeal involves two consolidated tax refund cases. Jurisdiction in the District Court was based on 26 *U.S.C.* 7422(a), 28 U.S.C. 1331, 1346(a)(1). While contested discovery was pending, the District Magistrate recommended that Summary Judgment be entered in favor of defendant.

---

[1] Page references (*e.g.* "72a") are to the Appendix filed with the Court of Appeals below, at No. 93-3367. Page references (*e.g.* "A2") are to the Appendix of this Petition.

The District Court did so, and was affirmed without opinion by the Court of Appeals for the Third Circuit. All issues raised in this Petition were raised in the Courts below.

Substantive Statement of the Case. This is a case where the IRS lost plaintiffs' files for more than twice the normal period of limitations, and then assessed a total of $150,452.90 in taxes and $334,196.66 in interest against plaintiffs, long after they no longer had the records or the recollection to successfully defend against substantial portions of the assessments.

Among other things, this case is about whether the IRS may obliterate Congressional policy back of the statute of limitations by having a taxpayer sign an open-ended form which is incomprehensible to a lay person. This is a case about whether the Courts may construe written documents on the basis of *ex post facto* judicial "policy", ignoring earlier decisions of the United States Supreme Court, and traditional legal principles governing waivers and the construction of documents. This is a case about whether the implied covenant of good faith and fair dealing applies to the United States government; about whether the government can reap a windfall profit of approximately $334,000 for its own negligence. This is a case about whether a party can be denied access to justice by the simple expedient of ignoring (without ruling on) the issues he raises. The fact that this case is about taxes, in an era of high budget deficits, should not remove it from the pale of the law—if we are a nation of laws.

The taxes in question are assessments of income taxes for the years 1974, 1975 and 1976 for all plaintiffs, and 1977 for Royden Kinter, made by the IRS in 1988 and 1989. The alleged waivers of the statute of limitations are the waivers for the 1975 and 1976 tax years (all Kinters) and for the 1977 tax year (for Royden Kinter) (A21 to A29).

All of the assessments of tax and interest complained of related to adjustments made to two partnership returns in which Clair and Royden Kinter (father and son) were partners, which adjustments flowed through to, and were taxed in, their respective individual returns.

Prior to 1974, Clair Kinter and his son, Royden Kinter, eked out a living[2] operating Marion Center Mining Company ("MCM"), a then-active strip mining partnership in which they each owned a 50% partnership interest. In 1974, following the Arab oil embargo, the demand for coal boomed, and MCM's sales skyrocketted for a brief period and then subsided (592a paras 7, 8). MCM reported income on an accrual basis as follows (561a; 635a; 648a; 661a):

	GROSS	*NET*
1974	$3,733,902.69	$875,191.43
1975	1,524,425.53	208,478.83
1976	412,132.21	(84,771.42)

MCM filed timely partnership returns (Form 1065) and the Kinters filed timely 1040 tax returns for all the years in question and timely paid the taxes shown on their returns (559a-560a; 592a para 5; 1001a).

In the years 1974, 1975 and 1976, to fulfill its obligations under environmental laws to restore and replant the land (called "backfilling" or "reclamation" in the vernacular), MCM claimed deductions for back-filling expenses incurred in connection with its mining operations. Because MCM reported on an accrual basis, these back-filling deductions were taken in the years in which they accrued, rather than the years in which they were paid (561a para 9; 647a; 659a; 671a), in accord with well settled law.[3]

---

[2] In the years 1970 to 1973, Clair & Ethel Kinter's taxable income never rose above $18,000 (285a), and Royden Kinter's taxable income never rose above $16,000 (686a).

[3] *Denise Coal Company v. CIR*, 271 F.2d 930 (3 Cir. 1959).

The Kinters were looking for an investment which would bring them returns when the boom in the coal industry subsided (592a paras 7 and 8). In 1975, Clair and Royden Kinter were persuaded by a broker in Indiana PA to purchase a 9.9% limited partnership interest each, in a partnership called DTAS, which had the U.S. distribution rights for a European movie called "Down the Ancient Staircase" starring Marcello Mastroianni, who at the time, they were told, was one of the top movie stars in the world. They entered into this venture expecting to make a lot of money on this movie, which they were told could not miss (592a-593a; 1124a-1131a). As limited partners, the Kinters played no role in setting up or managing DTAS (593a para 9; 1156a). The Kinters never received any return from their DTAS investment (608a; 1156a).

The Kinters, who have no accounting background, and know nothing about taxes, had their MCM partnership and personal returns prepared by a licensed public accountant, Mr. S. Gene Johnson of Punxsutawney, PA ("Johnson") (591a-592a; 606a; 607a para 9). Johnson was not a CPA (1166a-1168a). In those years there were no CPAs in that rural area of Pennsylvania (1172a-1168a). Neither the Kinters nor Johnson had anything to do with preparing the DTAS partnership returns. DTAS sent the Kinters a Schedule K-1, for each year which specified what deductions and credits were available to the individual partners. Johnson relied on them in preparing the Kinters' individual returns. The Kinters believed these were legitimate deductions for the start-up costs of the venture, just as they expected to pay taxes on the profits they believed the movie would make in the future (572a; 591a-593a; 606a-607a; 691a-696a). Later, when the profits never materialized, Royden Kinter contacted the broker to see what the problem was. He was told to "pound sand." (1133a). Unknown to the Kinters, the IRS (in August 1980) determined that DTAS was an abusive tax shelter (397a; 400a).

In 1977 through 1979 the IRS audited the Kinters' 1974, 1975 and 1976 personal tax returns and also the partnership returns of MCM. The audit was conducted by Agent Mikula ("Mikula Audit" hereinafter). For the 1974 tax year, Agent Mikula made certain adjustments which, in 1978 the Kinters agreed to, and paid (562a; 697a; 594a; 698a).

In addition, the IRS determined that for the 1974 tax year, it would disallow the backfilling (reclamation) deduction taken by MCM, on the grounds that it should be deducted in the years in which it was paid (mostly when MCM had losses, and would have had nothing to deduct it against), rather than in the years in which it accrued, even though MCM reported on an accrual basis (562a; 108a). The Kinters did not agree and filed a Petition for Redetermination on this issue with the Tax Court.

Although the 1974 tax year was the only year before the Tax Court, if the IRS were to win the back-filling issue for 1974, it would have had to make appropriate adjustments to the Kinters' tax returns for the 1975, 1976 and 1977 tax years also, because during those years, back-filling expenses were being accrued and paid on an on-going basis. Therefore, the audit determinations of those subsequent tax years were contingent upon how the Tax Court would resolve the back-filling issue for 1974. Accountant Johnson advised the Kinters to give the IRS an extension of time in which to finalize the 1975 and 1976 tax years which were under audit, pending resolution of the backfilling issue by the Tax Court for 1974 (563a-564; 594a). At the IRS's request, in November 1978, plaintiffs signed an IRS Form 872 (fixed term consent) which extended the period of limitation to December 31, 1980 (110a; 111a).

On November 15, 1979, the IRS wrote to the Kinters, explaining that the IRS's delay in finalizing the audit of their 1975 and 1976 tax returns was because the IRS

was waiting for the outcome of the 1974 Tax Court Case. (112a). There was no mention in this IRS letter of any additional open MCM issues or any open DTAS issues. The Mikula examination for the 1975 and 1976 tax years ended without any action being taken by the IRS. The 1977 tax year was never audited but the Kinters and their accountant were aware that the backfilling issue impacted all subsequent years (569a; 594a-595a).

Unknown to the Kinters, in 1979 Agent Mikula prepared an audit report for the 1975 and 1976 tax years for his superiors at the IRS in which he proposed adjustments for the 1975 and 1976 tax years based on other MCM issues which were unrelated to the backfilling issue (144a-147a; 153a-156a; 564a-567a; 923a-924a). The IRS failed to inform the Kinters of these other issues, or give them an opportunity to challenge their correctness, in violation of normal IRS practice (564a para 16; 953a-958a; 620a-622a).

Unknown to the Kinters, by February 8, 1978, an IRS audit of DTAS already was underway (381a-396a) and by January 21, 1982, "because of uncertainties associated with litigation" (121a) the IRS had made settlement offers to "some or all" of the other investors, and authorized a settlement offer to be made to the Kinters (121a). There is no dispute that no such settlement offer was made to the Kinters at or about that time (593a). The Kinter's case, apparently, fell between the cracks.

In January and March of 1980, the Kinter's Tax Court case on the backfilling issue for 1974 was still unresolved. The IRS sent Clair & Ethel Kinter, and Royden Kinter, respectively, Forms 872As to sign, extending the period of limitation for assessing taxes for the 1976 tax year (A21, A23). These 872A contain no specific date for the termination of the extension. Because of the long lapse of time, and for Clair Kinter the debilities of illness and advanced age, plaintiffs have no recollection of having signed any of the above forms,

or the circumstances surrounding the same. However, the signatures are theirs, and they recalled generally that they intended to give the IRS an extension of time for 1975 and subsequent years, until the backfilling issue could be determined by the Tax Court (594a-595a paras 17, 19 and 603a-604a; 607a paras 5, 6; 574a; 1073a; 1088a-1090a), which, because of the IRS's failure to follow normal procedures, was the only outstanding issue known to them.

On September 12, 1980 (114a), Counsel for the parties in the Tax Court case signed a stipulation in which the IRS conceded that there was no deficiency owed by the Kinters for the 1974 tax year (113a-114a). This meant that MCM had been correct in deducting the backfilling expenses as they accrued, rather than as they were paid. Therefore, no adjustments were required to the Kinters' returns for 1975, 1976, and 1977 on account of the backfilling issue (573a para 38; 922a-923a).

Nevertheless, in September and October of 1980, *after* the date of the Stipulation of Counsel in the Tax Court case (Sept. 12, 1980, 114a), *i.e.*, after the only outstanding issue known to the Kinters had been resolved in the Kinters' favor, the IRS sent the Kinters Forms 872A to sign for the tax years 1975 (all Kinters, A25, A29), and 1977 (Royden Kinter only, A27). At the time these forms were signed, the IRS did not advise the Kinters that there were any other open MCM or DTAS issues (597a para 27; 1017a).

The Kinters signed these forms in the mistaken belief that they were necessary to give the IRS a chance to clean up the paper-work involved as a result of the Tax-Court case (595a-596a), a state of mind caused by the IRS's failure to follow its own procedures, and further influenced by the IRS's letter of November 15, 1979 which stated that the delay in concluding the audit of the 1975 and 1976 tax years was because of the Tax Court case, without mentioning the existence of any other open issues (112a; 598a para 20).

The backfilling issue having been resolved, the Kinters and their accountant believed the 1975, 1976 and subsequent tax years were closed, and the extensions went out of their minds (573a; 596a-597a paras 22 through 28).

In January of 1987, more than six years after the last 872A had been signed, and more than ten years after their returns had been timely filed, the IRS reactivated the audit and assigned it to Agent Jamison, who advised the Kinters that their returns for 1975, 1976 (all Kinters), and 1977 (Royden Kinter only), had been in suspense since 1980, awaiting the outcome of the 1974 tax court case (128a; 129a).

In September, 1987, Agent Jamison proposed to assess additional taxes against the Kinters based on: (1) The disallowance of certain DTAS related deductions and investment credits, identical to the settlement authorized (but not offered) by the IRS in January 1982, and (2) the identical MCM issues raised in Agent Mikula's 1979 audit report for the 1975 and 1976 tax years (928a-929a; 137a-156a; 564a-567a; 960a; 964a-965a). In making her report, Agent Jamison did not conduct an independent field audit (904a). She relied entirely on the 1979 Mikula report (for MCM issues) and on Agent Leahy's 1980 DTAS audit report (918a).

In 1987 or 1988, Royden Kinter twice called Agent Jamison. He asked her why the government had waited so long. Kinter testified that Agent Jamison admitted, on both occasions, that the reason for the delay was that the IRS had lost their file (601a-602a paras 42, 43; 1118a-1121a). In her report, prepared within the scope of her duties (924a; 927a-928a; 936a), she admitted that due to a "misclassification" the Tax Court case remained in suspense longer than necessary (985a; 987a),—a circumspect way of saying the file had been lost for more than twice the normal period of limitations.

None of the Mikula audit issues had anything to do with the back-filling issue (923a-924a). No extension of the period of limitations was needed for the IRS to determine the correct tax owed on account of those Mikula 1979 audit issues. All of the facts necessary for a correct determination of those issues were available to the IRS and to the Kinters in 1979. Had the IRS disclosed those issues to the Kinters in 1979 (as its normal practice required it to do), the Kinters would have had the records and the recollection to ascertain the accuracy or inaccuracy of these issues. The IRS's delay, which was not necessitated by any good cause, deprived the Kinters of their ability to effectively defend themselves (565a para 18(b); 566a para 19(b); 567a-568a paras 22, 23, 24; 599a-600a).

In 1988, the Kinters on advice of counsel (602a para 44), signed Closing Agreements on Final Determination Covering Specific Matters (Forms 906), in which they accepted the proposed IRS settlement as to the correct treatment of DTAS expenses and credits (197a-200a; 212a-215a). However, they signed Forms 870 at the same time, in which they reserved their right to challenge the IRS's right to assess those taxes (187a; 211a; 991a-993a).[4] No Closing Agreement was signed regarding the MCM issues.

In 1988 and 1989, the IRS assessed against the Kinters a total of $484,893.68 ($150,452.90 in taxes, $334,440.78 in interest). The Kinters pledged their savings and their business equipment to borrow the money to pay these assessments, which have been paid in full (321a; 622a para 10; 629a). Timely Claims for Refund were filed, thus the jurisdictional pre-requisites of 26 *U.S.C.* Section 7422(a), have been met.

---

[4] Just as, in a personal injury case, the parties might stipulate to the amount of damages, but reserve the right to contest liability for such damages.

ARGUMENT

I. The assessments complained of are barred by the Statute of Limitations in that the 872As were not effective to extend the period of limitations in this case.

Section 6501(a) of the Internal Revenue Code provides, in pertinent part that income taxes must be assessed within three years after the return was filed unless the period is extended as specified in Section 6501(c)(4). The assessments complained of were made, not within 3 years, but more than 10 to 13 years after the returns were timely filed. Therefore they are time barred, unless the period of limitations was extended in accordance with the statute.

In *Florsheim Bros. Co. v. U.S.*, 280 U.S. 453, 466, 50 S.Ct. 215, 74 L.Ed. 542 (1930), the United States Supreme Court, held that an agreement to extend the statute of limitations under Section 250(d) of the Internal Revenue Code of 1921, was not a contract but a waiver, that the words "agree" and "agreement" in the statute and regulations covering such extensions were "ordinary words having no technical significance" 280 U.S. at 466, and that the statutory requirement that the Commissioner sign the instrument was merely an administrative requirement and did not turn the instrument into a contract.

Florsheim was followed by the Supreme Court in *Stange v. U.S.*, 282 U.S. 270, 276, 51 S.Ct. 145, 75 L.Ed. 335 (1931), where the Court again held that an agreement to extend the period for assessment of income tax was not a contract but was: "...essentially a voluntary, unilateral waiver of a defense by the taxpayer." 282 U.S. at 276. The statute before the Supreme Court in *Stange* and *Florsheim* was an ancestor of the present Section 6501 of the Internal Revenue Code. Nor were the waivers in those cases a Form 872A. The Supreme Court has not had occasion to consider the question since the enactment of the present Internal Revenue Code or since

the IRS started using 872As. Nevertheless, the pertinent wording of the 1921 statute is similar to the wording of the present statute in this particular respect.

Recent cases that have addressed the so-called indefinite waivers acknowledge that these instruments are waivers and not contracts, but nevertheless analyze them under the laws governing contracts, rather than the laws governing waivers, on the grounds that the statute calls for "agreement"—apparently unaware of the Supreme Court's decision in *Florsheim*, to the effect that the words "agree" and "agreement" in the statute are without legal significance in such cases and do not change a waiver into a contract. See for example the lead case, *Estate of Camara v. CIR*, 91 T.C. 957, 959 (1988) (". . .contract principles are important, however, because section 6501(c)(4) requires an agreement between the parties").

(a) Waiver: There was no waiver of the bar of the statute of limitations to permit the assessments complained of in the circumstances of this case.

Whether a case be criminal or civil, whether the right waived be constitutional or statutory, under both state and federal laws, a waiver is universally defined as a knowing, voluntary, intentional relinquishment of a known right or privilege. And a determination of whether there has been a knowing, voluntary relinquishment must depend on the particular facts and circumstances surrounding each case.[5] *Johnson v. Zerbst*, 304 U.S. 458,

[5] A substantial body of federal case law dealing with the law of waivers involves the waiver of constitutional rights: *Johnson v. Zerbst, supra; Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 2001 (1972); *D.H. Overmyer Co. Inc. v. Frick Company*, 405 U.S. 174, 92 S.Ct. 775, 782-783, 31 L.Ed.2d 124 (1972); *Erie Telecommunications, Inc. v. Erie*, 853 F.2d 1084, 1094-1096 (3 Cir. 1988). Some civil federal cases on waiver concern the waiver of federal statutory rights, such as rights involving unfair age discrimination, *Coventry supra; Cirillo, supra*. The definition provided above is universally accepted in all types of cases, with a higher burden of proof in cases involving the waiver of constitutional rights.

464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Panther Rubber Mfg. Co. v. CIR,* 45 F.2d 314, 316 (1 Cir. 1930); *Coventry v. U.S. Steel,* 856 F.2d 514, 521-525 (3 Cir. 1988); *Cirillo v. Arco Chemical Co.,* 862 F.2d 448 (3 Cir. 1988); *Richardson v. Lucas,* 741 F.2d 753, 757 (5 Cir. 1984).

Mistake, therefore, cannot form the basis of a waiver. *Inola Machine & Fabricating Co. v. Farmers New World Life Ins. Co.,* 631 F.2d 712, 715 (10 Cir. 1980) ("Because waiver requires an actual intention to relinquish a known right, mistake likewise cannot provide a basis for waiver." 631 F.2d at 715); *NCNB Nat'l Bank of N. Carolina v. Tiller,* 814 F.2d 931, 938 (4 Cir. 1987) ("A waiver is an intentional abandonment of a known right, not a mere trick to catch one napping." 814 F.2d at 938).

The Magistrate in the case at bar applied the "objective manifestation" test to determine the validity of the 872A waivers at issue, holding that the Kinters' subjective intent was irrelevant. With due respect, if a waiver is a knowing, intentional relinquishment of a known right or privilege, it is a contradiction in terms to apply the "objective manifestation" test.

Civil rights acts are expressions of Congressional policy. So are statutes of limitation for assessment of tax. The former touch our hearts and ideals. The latter affect the economy which fuels our ideals. The prerequisites of waiver for statutory rights should be uniformly applied. In *Coventry, supra* (an age discrimination case) the waiver of statutory rights was in the form of a written release. The Court held that in determining whether or not a waiver had been entered into knowingly and voluntarily, a "... review of the totality of the circumstances in which it was signed must be had." 856 F.2d at 524.

The indicia the Court used for determining whether or not the waiver was knowing and voluntary, included, in pertinent part, knowledge and sophistication of the

plaintiff, role of the plaintiffs in drafting the terms of the document, clarity of the document, assistance of counsel, totality of the circumstances, 856 F.2d at 523. Applying these indicia to the case at bar: (a) so far as the 872As for 1975 (all Kinters) and 1977 (Royden Kinter only) were concerned, there is no dispute on this record that they were signed by mistake; and (b) so far as all the 872As are concerned, there is no dispute that both plaintiffs, and their accountant, who advised them to give the extensions, did not understand that these documents waived the statute of limitations indefinitely unless they acted to terminate them with a Form 872-T. Nor were plaintiffs or their accountant aware that the extension was sought for any issues other than the backfilling issue which was then pending before the tax court for their 1974 tax year. Therefore, there was no knowing, voluntary waiver of the statute of limitations to support the assessments complained of. A brief review of the undisputed facts as they relate to the indicia spelled out in *Coventry* follows. Defendant has offered no evidence disputing these facts, therefore, they warrant entry of summary judgment for plaintiff.

Ethel Kinter was a housewife. Clair Kinter is a high school graduate, and never attended college. Royden Kinter is a college graduate with a history major. None of the plaintiffs have knowledge of the law, taxes, or accounting (591a-592a; 606a; 607a para 9). Ethel Kinter (77 years old when she made her summary judgment affidavit) did not remember signing the 872As or why. She did not remember she had extended the statute of limitations, and did not know she was supposed to take any action to terminate documents she did not remember signing (610a-611a). Clair Kinter (81 years old when he made his summary judgment affidavit) has had serious health problems since the late 1960s. His memory and comprehension are impaired by medication, illness and age, and have been for many years. He did not remember

signing the Forms 872A, and did not understand them (606a-609a; 122a; 1088a-1090a; 1100a-1102a; 1150a-1151a). He states in his affidavit "I did not know I had signed any papers which would allow the government to come against me for taxes after so many years. I didn't know I was supposed to do anything to prevent this from happening." (606a para 15). Although not suffering from the debilities of illness or old age, Royden Kinter found the language of the Forms 872A incomprehensible (595a-596a paras 19, 20, 22; 1109a-1110a). Therefore the Kinters consulted their accountant Gene Johnson who testified: "When I read the forms I didn't understand that there was any type of a form that opened it up forever." (1177a).

The Kinters did not have any hand in drafting the 872-As, (which are pre-printed IRS forms), or in filling in the blanks, all of which was done by the IRS. They did not seek the advice of counsel prior to signing the 872As because they believed that the IRS had sent them the appropriate forms to accomplish the extension required for the backfilling issue (595a para 19). In this respect, they acted no differently from the vast majority of individuals and small business taxpayers (especially in rural outlying areas) who routinely deal with the IRS without the intervention of a lawyer. Our system of tax collection could not work if it were otherwise. Neither the Kinters, nor their accountant understood that these documents were waivers which could last forever unless they acted to terminate them (595a-597a paras 20-28; 1109a-1110a; 570a para 29; 1176a). As Royden Kinter expressed it, he did not know there was anything out there to terminate (597a-598a para 28).

The language of the 872As is ambiguous and incomplete, as to both their scope and duration, so extrinsic evidence should have been considered in

construing it, and the Courts below erred in applying the "objective manifestation" test.[6]

Scope: The 872As in the case at bar should be construed in pari materia with the IRS letter of November 15, 1979, which identifies the pending tax court case as the only issue delaying completion of the audit of the 1975 and 1976 tax years (112a). The government would have the scope of the 872As construed so as to impute to the Kinters the intent to waive the protection of the statute of limitations and allow the IRS to assess additional taxes and interest against them on the basis of any and all issues, known or unknown, disclosed or undisclosed, past, present or such as might be discovered in the future. The language of the waivers, which were drafted by the IRS and so should be construed most strictly against it, does not so state. And the evidence of plaintiffs is to the contrary. The Court below should not have re-written these waivers to impute such an improbable intent to plaintiffs. One has but to look at the Truth in Lending laws to see how far short of accepted standards of disclosure for informed consent the 872A falls.

Duration: Paragraph 1 of the 872As for 1975, 1976 and 1977 state that income taxes may be assessed on or before the 90th day after the events described in (a), (b) and (c). Paragraph 2 describes other circumstances under which the extension of the statute of limitations will end. No place does the form state that these methods of termination are exclusive. No place does the form state that the waiver will last indefinitely unless so terminated. The Courts below construed the 872As so as

[6] This is true under the settled law of both waivers and the construction of contracts. In *Sun Oil v. CIR*, 562 F.2d 258, 262 (3 Cir. 1977), the Court held that:

> "... the subjective intent of the parties may be a consideration in interpreting an agreement where the documents are ambiguous or incomplete ..." 562 F.2d at 262.

to impute to the Kinters in 1980, as a matter of law, an intention that the waivers would last indefinitely, regardless of whether or not there was any good reason for the waivers' continued life, even if the IRS might lose (or misclassify) their file for more than twice the normal period of limitation, and then assess taxes against them years into the future, when they no longer had the records or the recollection to challenge the correctness of the assessments. No taxpayer in his right mind would intend such waivers to have such effects. It is no answer to say that the Kinters could at any time have terminated these waivers. To do so, they would have had to understand that the waivers would continue indefinitely unless so terminated. There is no clear language (not in bold print, not even in fine print[7]) in this pre-printed IRS form which clearly states that the waiver might last indefinitely unless the taxpayer takes action to terminate it. Once again, the Courts below read into the IRS's Form 872A language which it does not contain. Under general federal case law, indefinite waivers of statutes of limitation are void as against public policy. *Noel v. Baskin*, 131 F.2d 231 (DC Cir. 1942); *Munter v. Lankford*, 127 F.Supp. 630 (1955). In *Noel*, the Court noted that even if, under the circumstances of a particular case, a federal court might uphold an indefinite waiver, the intent to make the waiver indefinite must be expressed in specific language which is unequivocal, 131 F.2d at 232. There is no specific or unequivocal language in the Form 872A that states that it may last indefinitely if a taxpayer does not act affirmatively to terminate it.

---

[7] The law requires in a variety of instances that printed contracts bring the waiver of important rights to a lay person's attention by conspicuous print and clear, simple language. See for example the Uniform Commercial Code's requirements where waivers of implied warranties of merchantability and fitness for the purpose intended are printed into an instrument. 13 *Pa.C.S.* Section 2316.

In short, under the indicia in *Coventry* for determining whether or not a waiver was entered into knowingly and intentionally—knowledge and sophistication of the plaintiff, role of the plaintiffs in drafting the terms of the document, clarity of the document, assistance of counsel, totality of the circumstances—it is clear that there was no knowing intentional waiver by the Kinters of the statute of limitations for an indefinite duration, or for anything other than an adjustment of the backfilling issue, pending determination of that issue in their tax court case.

The history of the case law regarding the construction of the duration of so-called indefinite waivers of the assessment statute of limitations may be summarized as follows. For many years a majority of the Courts construed waivers which did not contain a fixed term as being effective for only a reasonable time, or upon termination by either party upon reasonable notice. *McManus v. CIR,* 583 F.2d 443 (9 Cir. 1978); *Revere Copper & Brass v. U.S.,* 3 F.Supp. 157, 159-160 (Ct. Cl. 1933); *Pictorial Printing Co. v. CIR,* 38 F.2d 563, 565 (7 Cir. 1930); *Farmers Union State Exchange,* 30 BTA 1051, 1067 (1934); *Nathan Loser v. CIR,* 27 BTA 601, 604 (1933); *Ethel D. Co.,* 27 BTA 25, 27-28 (1932). Except for *McManus,* the waivers in those cases, though unlimited as to duration, were not Forms 872A. The Second Circuit held that indefinite waivers should end within a reasonable time after the taxpayer gave notice of its termination. *Greylock v. CIR,* 31 F.2d 655 (2 Cir. 1929). In *McManus v. CIR,* 583 F.2d 443 (9 Cir. 1978), the taxpayer sought to invalidate all 872As because the Form did not set a definite time when the extension would expire, thereby defeating the congressional intent back of 26 *U.S.C.* 6501(c)(4). The Court found against the taxpayer on this issue, stating:

> "This form [the 872A] does not, as the taxpayers contend, extend the limitations period forever. The tax court held that the waiver would be accepted and operative for a reasonable time only." 583 F.2d at 446.

In 1988, the Tax Court, *en banc*, in *Estate of Camara v. CIR*, 91 T.C. 956 (1988), announced that for reasons of "policy" it would no longer follow the reasonable duration rule set forth in *McManus*. Tax Court's decision in *Camara* was cited with approval and followed in *Stenclik v. CIR*, 907 F.2d 25 (2 Cir. 1990), and *Wall v. CIR.*, 875 F.2d 812 (10 Cir. 1989). *McManus* has since been overruled by the Court of Appeals for the Ninth Circuit, *St. John v. United States*, 951 F.2d 232 (9 Cir. 1991). But so far as we are aware, *Pictorial Printing* and its "reasonable duration" rule has not yet been overruled or specifically disavowed by the Seventh Circuit. So, we still have a split of authority at the appellate level.

In *Camara*, and *Stenclik*, the Court declined to engraft on to the agreement of the parties a "reasonable duration" provision which the parties had not seen fit to insert therein (engaging in the fiction that an 872A is a bargained for exchange, instead of a pre-printed IRS form which the taxpayer is given to sign without the faintest idea of its legal significance). The Court in both these cases, however, engrafted on to the 872A another provision which the form did not contain: that the means of termination specified therein were exclusive, and that the waiver would last indefinitely unless so terminated. In so doing, the court imputed to the taxpayer, *ex post facto*, an intent that is not expressed in the document, and one that, in *Camara* at least, (as in the case at bar), was contrary to the prevailing legal construction of the document at the time the taxpayer signed it. We respectfully submit, written instruments should be construed by the Courts to ascertain and give effect to the intentions of the parties if a contract, or the person

signing it, if a waiver, not to make policy. Congress and the IRS are admirably suited to making policy, and have never been bashful about doing so.

Wall was also decided on the basis of "policy." However, the Court admitted that:

> "... we do not exclude the possibility of finding the government may be barred in an egregious case ... for instance when the IRS has made no contact with the taxpayer for twenty years after a Form 872A was executed." 875 F.2d at 813.

In so stating, the Court substituted its judgment of what might be an acceptable period of limitation for the Congressional intent specified in 26 *U.S.C.* Section 6501.

We respectfully submit, *Camara, Stenclik, Wall* and their progeny are not good law, and should be overruled. In the alternative, their holdings should not be extended to the facts of the case at bar. In *Camara, Stenclik* and *Wall* the taxpayers were sophisticated business persons, aware that disputed issues existed and that they had signed indefinite waivers. They knew that they could have (but did not) terminate them. In the case at bar, the taxpayers did not know that there were any outstanding issues after the tax court case had concluded (573a para 37; 1198a-1199a; 600 para 34). They did not know that the extensions they had given the IRS would last indefinitely unless they took action to terminate them. Moreover, the facts of the case at bar surely place it within the "egregious" exception to the general rule announced in *Wall.* The Magistrate's Report found that the circumstances of this case were indeed egregious (1262a).

(b) The use of 872As to make the assessments complained of violated Congressional policy back of Section 6501 of the Internal Revenue Code.

Under federal common law, indefinite waivers of the statute of limitations are deemed void and unenforceable as contrary to public policy. *Noel v. Baskin*, 131 F.2d 231 (DC Cir. 1942); *Munter v. Lankford*, 127 F.Supp. 630, 631-633 (D.C. Dist. 1955). And this rule is followed in a majority of jurisdictions. 1 *Williston on Contracts*, (3d ed.) Section 183.

So long as a taxpayer is aware that an 872A is outstanding, and knows that he can terminate it at any time on 90 days' notice, the government may argue that it is, in effect, nothing more than a continuing 90 day extension. This argument has no merit if the "objective manifestation" test is used to determine the validity of an 872A because the language of the Form 872A does not convey to the taxpayer that it may last forever unless he acts affirmatively to terminate it.

In short, under the government's position in this case, the IRS can totally neutralize Congressional intent and obliterate the three year statute of limitations by the simple expedient of having a lay taxpayer sign a Form 872A which he neither understands nor, years later, remembers that he has signed, regardless of how delinquent the IRS might be in assessing taxes against him thereafter. This is not in keeping with Congressional policy in enacting a statute of limitations.

The dangers inherent in indefinite waivers become apparent when one considers that when waivers are used to extend the period of limitations under 26 *U.S.C.* Section 6501(c)(4), the interest on the additional tax assessed, as well as on certain penalties, does not stop. Therefore, the longer the period of the extension, the more onerous is the ultimate assessment against the taxpayer, because penalties and interest are assessed and

collected as tax, 26 *U.S.C.* Sections 6601(e)(1) and 6662. And the interest (on tax and certain penalties) compounds daily, with the taxpayer, being liable for continued penalties, interest on penalties and interest on interest.

The Court in *Wall* opined that it might hold an 872A ineffective to sustain an assessment say twenty years after it was signed if the IRS had not contacted the taxpayer in all that time. The amended affidavit of Thomas Douglas, CPA, shows, on a hypothetical tax deficiency of $67,000, assessed within the three year period of limitations, the total liability (tax, interest and pre-1986 penalty) would be $83,464. Within the twenty years mentioned in Wall, the total liability on $67,000 of tax (excluding post-1986 penalties) would be $670,367 (623a-625a). In this illustration, penalties are fixed at their low 1975 tax year level. Since then the Code has been amended to dramatically increase penalties, as the Amended Douglas Affidavit demonstrates (627a-628a). Therefore the impact of the "policy" announced in *Camara, Stenclik* and *Wall* would be substantially more devastating to the taxpayer today than shown in the Douglas Affidavit illustration.

It could not have been Congress's intent to have liability for such penalties and interest escalate without limitation as to time, where the extension serves no legitimate governmental purpose, simply because a taxpayer signed an IRS Form without understanding what he was doing, and who, because of lapse of time, had forgotten what he might have signed.

Rev. Proc 79-22 states that "Form 872A is provided . . . to relieve the Service, in part of the problems of maintaining controls to ensure that the period of limitation does not expire during consideration of a case . . ." Section 2.03 (883a). However, the enactment of the statute of limitations, by definition, discloses a Congressional intent to require the IRS to maintain such

controls. The same system of controls that is operative for the original statute of limitations would be available for keeping track of extensions. It is the IRS's business to collect taxes, and the maintenance of such controls is a normal part of that business. In short, by enacting a statute of limitations, Congress has placed the burden of maintaining such controls on the IRS. *Camara*, *Stenclik* and *Wall*, by contrast, have placed the burden for maintaining such controls on the taxpayer, who, of the two parties, is the least equipped to maintain such controls. The "policy" of the above cases is at odds with Congressional intent, and, if used in conjunction with an "objective manifestation" test, has the practical effect of obliterating the statute of limitations.

II. In the alternative, if the 872As were valid, the assessments complained of were made in violation of the covenant of good faith and fair dealing implied in the 872As, and therefore do not fall within the extension of time afforded by them.

Implied in every transaction is a covenant of good faith and fair dealing. Although this principle is usually articulated in connection with contracts, it applies to any transaction where discretion is lodged in one of two parties, *Boone v. Kerr-McGee Oil Industries, Inc.*, 217 F.2d 63, 65 (10 Cir. 1954) ("Where discretion is lodged in one of two parties to a contract *or a transaction*, such discretion must ... be exercised in good faith." (emphasis added) 217 F.2d at 65). This principle of law has been incorporated into Section 205 of the *Restatement, Contracts* 2d (and Comment d), and into Section 1-203 of the *Uniform Commercial Code* (1978).

The covenant of good faith and fair dealing is applicable to the United States where it chooses to become a party to a transaction. *Commerce International Company, Inc. v. United States*, 338 F.2d 81, 85 (US Ct. Cl. 1964).

What is "good faith" and "fair dealing" in a given circumstance must be determined by ascertaining and honoring the reasonable intentions and expectations of the parties to the transaction, *Tymshare Inc. v. Covell*, 727 F.2d 1145, 1152-1153 (DC Cir. 1984, Opinion by Scalia, J.); *Boone v. Kerr-McGee Oil Industries, Inc.*, 217 F.2d 63, 65 (10 Cir. 1954); *MacDonald v. Winfield Corporation*, 93 F.Supp. 153, 163 (E.D. PA 1950), *aff'd.* 191 F.2d 32 (3 Cir. 1951).

The expectations and intentions of the Kinters has already been considered. Rev. Proc. 79-22 expresses the expectations and intentions of the IRS. It states that such waivers are necessary "to provide *adequate time* for consideration of *disputed issues.*" Section 2.02 (emphasis added) and Sections 2.01, 2.03 (A15-A16).

It is clear from the above, that in entering into the 872As in 1980, it was not the intention of any of the parties, that the extensions would cover a situation where the IRS would lose (or misclassify) the taxpayers' files for more than twice the normal period of limitation, and then, years after all outstanding disputes known to the taxpayers had been resolved by the tax court, assess taxes and interest against the taxpayers, on issues which taxpayers were not aware were in dispute, without any good reason for the delay, and long after the taxpayers no longer had the records or the recollection necessary to defend themselves against the assessments.

Yet this is precisely what the IRS did. In so doing, it acted in breach of the covenant of good faith and fair dealing implied in the 872As. Therefore, the 872As cannot be used to support the assessments complained of which are time barred.

III. If the 872As are deemed effective to waive the bar of the statute of limitations, the Kinters are entitled to summary judgment in their favor on the additional assessments of tax and interest thereon, related to the McIntire Coal Company deposit.

Agent Mikula's 1979 report proposed increasing the gross receipts of MCM by $74,750.00 for the 1975 tax year for the following reason:

> "Bank deposit made on 2/28/75 for $74,750.00 represented coal sales to McIntire Coal Co. The $74,750 was inadvertently not included in the gross receipts figure per the tax return." (145a; 154a).

Agent Mikula's 1979 report also adjusted the depletion allowance which he linked to increasing MCM's income on account of the McIntire Coal sales deposit (923a). These two adjustments—the increased income from the McIntire Coal Company deposit and the resulting depletion adjustment—were adopted by Agent Jamison to increase the net income of MCM for 1975 by $78,729.43. This increased income adjustment flowed through to the two partners Clair and Royden Kinter, and ultimately resulted in an assessment of additional tax and interest against the plaintiffs in May and August of 1989, as follows: Clair Kinter: Tax $24,729, Interest $62,012.47; Royden Kinter: Tax $24,655, Interest $61,215.94 (622a-623a). This assessment of additional taxes (and interest) was incorrect as a matter of fact and law. The following facts are not in dispute in this summary judgment record.

MCM reported income, for tax purposes, on an accrual basis (565a para 18(a); 1184a-1185a; 1212a; 1216a). Under generally accepted accounting principals (GAAP) and Internal Revenue Regulation 1.451-1, an accrual basis taxpayer must report income, for tax purposes, when the right to receive the income accrues, and not when payment is received (621a-622a).

Thus, MCM would have been obligated to report the McIntire Coal sales as income at the time it shipped or invoiced the coal to McIntire Coal Company (1184a-1188a). Evidence of when that occurred such as bills of lading, and invoices no longer exist (1190a-1191a; 1103a-1104a). The Kinters, unaware that this issue was outstanding in the mind of the IRS, had no reason to preserve these records for years beyond normal business practice (1200a-1201a; 1137a-1138a).

Royden Kinter testified that because of the 16 to 17 year lapse of time, he could no longer recall when those specific sales may have been made, delivered and invoiced, but that, if paid for in February 1975 (as Mikula's report states), it would be reasonable to infer that they were shipped before Christmas of 1974, because MCM was shut down from November of 1974 through April of 1975 except for a couple of weeks before Christmas (599a para 33; 1141a-1144a). If the coal was delivered and invoiced in 1974, these sales would have accrued in 1974, and thus would have been reported as income in 1974, when they accrued. Therefore, there would have been no reason for them to be reported again as income in 1975, when they were paid for.

On its 1974 tax return, MCM reported as income $312,763.58 in accounts receivable (1191a-1192a; 647a Sched. L, line 2, column D) *i.e.* $312,763.58 worth of income which had accrued, but had not yet been received by MCM. This accrued income flowed through to, and was included as taxable income in the partners' individual 1040 returns for 1974. Therefore the partners had already paid tax, in 1974, on $312,763.58 worth of income which they had not yet received.

The government has produced no evidence as to when the McIntire Coal sales *accrued.* The only "evidence" which the government has produced is Agent Mikula's report stating that a payment from McIntire Coal

Company, made in February 1975, was not included in 1975's taxable income. To an accrual basis taxpayer, such evidence is irrelevant to determining taxable income (Agent Mikula apparently had difficulty with the whole concept of accrual reporting—witness the backfilling issue). To sustain the correctness of its assessment on account of the McIntire Coal payment, the government would have to show *some* evidence of when the right to receive payment for those sales *accrued*. This the government has not done.

In making this adjustment, the IRS took the position (without benefit of evidence) that the $74,750 was not reported in the prior year. Agent Jamison's Report Transmittal and attachments state:

> "Income was reported on an *accrual basis* using a double entry set of books. The examination of the 1975 books reflected a deposit on February 28, 1975 in the amount of $74,500 [sic] which was not included in the gross receipts reported for 1975 *or in the prior year which was also examined.*" (982a) (emphasis added).

Agent Jamison did not personally examine the MCM records for the prior year, 1974 (904a), so her assertion that the income was not reported in that year was not based on personal knowledge. She explained her conclusion as follows:

> "It is the government's position that the income was not reported in any prior year (which is supported by the fact that the same Revenue Agent examined all years) . . ." (983a).

In short, it assumes that Agent Mikula must have checked it out, without producing any evidence to support this assumption. Agent Jamison acknowledged in her MCM Report Transmittal for 1975, 1976, that:

> "Because the 1974 year was separated from these years, much of the background information and case development appears to be lacking. The unagreed report is prepared based only on the information available through the workpapers." (978a).

But the government produced no workpaper that itemized what accounts receivable were, or were not, included in the $312,763.58 which MCM reported on its 1974 return as accrued (but not yet received) income, such as would evidence that the McIntire Coal sales in question were not reported in 1974. Plaintiffs believe that they were. Their accountant Gene Johnson testified that if a recording error had occurred in MCM's books, it would be most unlikely that any such error would not have been caught, prior to preparing the tax returns, because of the double entry book-keeping system they used (1178a-1179a). Although her report acknowledges that MCM reported income on an accrual basis, she admitted that she treated MCM as a cash basis taxpayer in determining the Kinters' tax liability related to the alleged unreported income (917a).

The Court of Appeals for the Third Circuit has recognized that although a "presumption of correctness" automatically attaches to an assessment made by the IRS, in order to give effect to that presumption in a case of *unreported income* (as distinguished from *deductions*) the government must produce *some* evidence to support the correctness of the assessment. *Anastasato v. CIR*, 794 F.2d 884 (3 Cir. 1986); *DeCavalcante v. CIR*, 620 F.2d 23, 27-28 (3 Cir. 1980); *Gerardo v. CIR*, 552 F.2d 549, 553-555 (3 Cir. 1977). In the case at bar, the IRS made this assessment without any evidence as to when these sales accrued, and without any evidence that they were not reported in the year in which they accrued.[8]

[8] See *U.S. v. Walton*, 909 F.2d 915, 919 (6 Cir. 1990), and *Gatlin v. CIR*, 754 F.2d 921, 923 (1985), *re* the difference in the burden of proof where the deficiency is based on *unreported income* and where it is based on *disallowed deductions*.

Plaintiffs' evidence warrants an inference that the sales accrued in 1974 and were reported in that year. In the alternative, a dispute of material fact exists which precludes entry of summary judgment in the government's favor.

IV. The IRS is estopped from making the assessments of MCM related tax and all interest complained of.

We are well aware that the rule in the Third Circuit for applying estoppel against the government requires affirmative misconduct under *U.S. v. Asmar,* 827 F.2d 907 (3 Cir. 1987) and earlier decisions. However, the type of estoppel involved in *Asmar* and its predecessor *Community Health Services v. Califano,* 698 F.2d 615 (3 Cir. 1983), revs'd. sub nom. *Heckler v. Community Health Services,* 467 U.S. 51, 81 L.Ed.2d 42, 104 S.Ct. 2218 (1984), was different from the type of estoppel involved in the case at bar. In those cases, the estoppel, if applied, would have caused the government to lose revenues or funds which it was otherwise entitled to collect or retain. In the case at bar, the government's negligent misconduct resulted in a financial windfall to the government totalling (for all Kinters) $334,196.66 in interest only—not counting the alleged MCM related tax deficiencies regarding which they no longer have the documentation to disprove the IRS's position. In short, we have here a situation where, the more negligent the government is, the more money it collects, which it otherwise would not have been entitled to collect. In short, the type of estoppel involved in this case is that which states that a party may not profit by his own wrongful conduct.[9]

---

[9] It is the type of estoppel that would not harm the government *Tonkonogy v. U.S.,* 417 F.Supp. 78 (SDNY 1976); and would not bring a result that is either inequitable or contrary to law. *Interstate Fire Ins. Co. v. U.S.,* 215 F.Supp. 586, 599 (E.D. Tenn. 1963).

In *Heckler,* the United States Supreme Court stated that "equitable estoppel is an equitable doctrine invoked to avoid injustice in particular cases." 467 U.S. at 59, and noted that "a hallmark of the doctrine is its flexible application" *id.* The Court left for a future case the question of when, and under what circumstances, the government might be estopped, 467 U.S. at 60-61. Plaintiffs submit that this is a case that warrants the application of the principle of estoppel against the government, so far as the MCM issues and all interest after April 1982 is concerned.

Respectfully submitted,

DINA G. McINTYRE
Counsel of Record
McINTYRE & McINTYRE
1609 Lawyers Building
Pittsburgh, Pennsylvania 15219
(412) 391-9422
Attorney for Petitioners

APPENDIX

Judgment Order of the United States Court of Appeals Dated March 17, 1994.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3367

CLAIR B. KINTER, an individual
ETHEL B. KINTER, an individual

v.

UNITED STATES OF AMERICA
(D.C. Civil No. 91-396)

ROYDEN E. KINTER, an individual

v.

UNITED STATES OF AMERICA
(D.C. Civil No. 91-460)

Clair B. Kinter and
Royden E. Kinter
Appellants

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civil Action Nos. 91-00396 and 91-00460)
District Judge: Honorable Donald J. Lee

Submitted Under Third Circuit LAR 34.1(a)
March 3, 1994

BEFORE: STAPLETON and SCIRICA, *Circuit Judges*, and VAN ANTWERPEN, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ORDERED AND ADJUDGED that the judgments of the district court entered June 4, 1993, be and the same are hereby affirmed.

Costs taxed against appellants.

By the Court,

WALTER K. STAPLETON
Circuit Judge

ATTEST:

P. DOUGLAS SISK
P. Douglas Sisk, *Clerk*

DATED: MAR 17, 1994

---

* Honorable Franklin S. Van Antwerpen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

A3

Amended Memorandum Order of the District Court Dated June 3, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 91-396

CLAIR B. KINTER and ROYDEN E. KINTER,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

AMENDED MEMORANDUM ORDER

This action was referred to United States Magistrate Judge Gary L. Lancaster in accordance with the Magistrates Act, 28 U.S.C. §636 (b) (1), and Rules 3 and 4 of the Local Rules for Magistrates. The Magistrate Judge filed his Report, which concluded that defendant's motion for summary judgment should be granted. Plaintiff filed timely objections to the report. After *de novo* review of the pleadings and documents in the case, together with the Magistrate Judge's Report and objections thereto, the following ORDER is entered this 3rd day of June, 1993:

Defendant's motion is granted.

The Report filed by Magistrate Judge Lancaster is adopted as the Opinion of the Court.

DONALD J. LEE, J.

Magistrate's Order of Court Dated June 2, 1993
Amending Magistrate's Report
Dated April 21, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Consolidated Civil Actions at No. 91-396

District Judge Lee, Magistrate Judge Lancaster.

CLAIR B. KINTER, ROYDEN E. KINTER,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER OF COURT

AND NOW, this 2 day of June 1993, it appears to the Court that:

1. A Suggestion of Death was filed by plaintiff Clair Kinter on May 8, 1992 (Civil Action No. 91-396, Doc. #62), wherein Clair Kinter notified the Court of the death of Ethel Kinter and of the fact that her interest in the said civil action had passed to him, so that Clair Kinter is the sole plaintiff in Civil Action No. 91-396.

2. The District Court, by Order dated January 22, 1993, ordered that the case of Royden Kinter v. United States, Civil Action No. 91-460 be closed and that he be shown as an additional plaintiff at Civil Action No. 91-

396. Thereafter, the correct caption of the case at Civil Action No. 91-396 was and is: Clair B. Kinter and Royden E. Kinter, plaintiffs, v. United States of America, defendant.

3. Defendant's Motion for Summary Judgment, together with all supplements and renewals thereof, and Plaintiffs' Cross Motion for Summary Judgment, and the Exhibits and briefs of both parties related to the claims of both plaintiffs, Clair Kinter and Royden Kinter, as did the Report of the undersigned Magistrate Judge dated April 21, 1993.

It therefore is ORDERED that the caption of the undersigned Magistrate's Report dated April 21, 1993, recommending that summary judgment be entered in favor of defendant, hereby is corrected to read "Clair B. Kinter and Royden E. Kinter, plaintiffs, v. United States of America, Civil Action No. 91-396," and that the recommendation contained therein applies to both plaintiffs, Clair B. Kinter and Royden E. Kinter. It is further ORDERED that plaintiffs' Objections to the said Report and defendant's Response to the said Objections shall be deemed to apply to both Clair Kinter and Royden Kinter.

GARY L. LANCASTER
United States Magistrate Judge.

cm: All parties of record MP.

Memorandum Order of the District Court
Dated May 24, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 91-396

CLAIR B. KINTER and ETHEL B. KINTER,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM ORDER

This action was referred to United States Magistrate Judge Gary L. Lancaster in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1), and Rules 3 and 4 of the Local Rules for Magistrates. The Magistrate Judge filed his Report, which concluded that defendant's motion for summary judgment should be granted. Plaintiff filed timely objections to the Report. After *de novo* review of the pleadings and documents in the case, together with the Magistrate Judge's Report and objections thereto, the following ORDER is entered this 24th day of May, 1993:

Defendant's motion is granted.

The Report filed by Magistrate Judge Lancaster is adopted as the Opinion of the Court.

DONALD J. LEE, J.

Report of the Magistrate Dated April 21, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 91-396

CLAIR B. KINTER and ETHEL B. KINTER,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

R E P O R T

GARY L. LANCASTER,
United States Magistrate Judge

In this action, plaintiffs seek a refund of additional taxes assessed by the IRS after an audit for taxable years 1974, 1975, and 1976. Plaintiffs allege that they are entitled to a refund because the IRS made the assessments after the statute of limitations for doing so had expired. Before the court are the parties' cross motions for summary judgment. For the reasons set forth herein, the motion of the government should be granted, the plaintiffs' motion denied, and this case closed.

I.

This tax case has become very complex. However, its complexity stems not so much from the actual dispute, but rather because the litigants have chosen to advance

what seems to be an infinite number of arguments in support of and opposition to their positions. A complete recitation of all of the parties' factual and legal contentions would serve more to confuse the issues in the case rather than clarify them. Therefore, we restrict ourselves to the following undisputed facts which are material to the cross motions.

Plaintiffs are husband and wife. Beginning on an unspecified date in the late 1970's, plaintiffs' 1974, 1975, and 1976 personal income tax returns were subject to sequential audits by the Internal Revenue Service. However, while the audits were pending, and because the matters were complicated by an ongoing tax court case, the IRS, as is their routine custom, "suspended" action on the audits and forwarded to plaintiffs waivers of the statute of limitations for assessment, Internal Revenue Service Form 872-A. Plaintiffs signed the Form 872-A waivers in 1980.

Thereafter, there was apparently no relevant activity or interaction between plaintiffs and the IRS until 1987 when the IRS reactivated the audits. In 1988 and 1989, for reasons not germane to the motions, the IRS disallowed certain claimed deductions and plaintiffs were assessed with additional taxes, interest, and penalties. Plaintiffs paid the additional assessments and filed the instant action seeking a refund on the basis that the assessment was barred by the statute of limitations.[1]

---

[1] We recognize that we have painted the factual background of this case with rather broad strokes; however, the factual details are not critical to the central issue in the case, i.e. were the assessments barred by the statute of limitations.

II. STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence on file show that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. Rule 56(c). A "material fact" is one whose resolution will affect the ultimate determination of the case. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982).

To demonstrate entitlement to summary judgment, the defendant, as the moving party, is not required to refute the essential elements of the plaintiff's case. The defendant need only point out the insufficiency of the plaintiff's evidence offered in support of those essential elements. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1229 (3d Cir. 1988). Once that burden has been met, the plaintiff must identify affirmative evidence *of record* which supports each essential element of this cause of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986).

Therefore, in order to defeat a properly supported motion for summary judgment, a plaintiff can not merely restate the allegations of his complaint, *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988), nor can he rely on self-serving conclusions unsupported by specific facts in the record. Plaintiff must point to concrete evidence in the record which supports each essential element of his case. *Celotex*, 477 U.S. at 322-23. If the plaintiff fails to provide such evidence, then he is not entitled to a trial and defendant is entitled to summary judgment as a matter of law.

III. DISCUSSION.

Despite the plethora of arguments submitted by the litigants, the issue is relatively simple, i.e. whether the Form 872-A waivers of the statute of limitations which the plaintiffs signed in 1980, are valid, thus allowing the government to assess additional taxes in 1989. If so, plaintiffs can not prevail regardless of the theories advanced.

Ordinarily, the Internal Revenue Code provides that tax deficiencies must be assessed against a taxpayer within three years of the filing of the tax return. 29 U.S.C. §6501(a). Otherwise, such deficiencies are barred by the statute of limitations. However, the taxpayer and IRS may execute a waiver of the statute of limitations. *Id.* §6501(c)(4). The IRS uses two types of waivers. The first type of waiver, Form 872, expires on a stated date. The second type, Form 872-A, waives the statute of limitations for an indefinite period of time.[2] To terminate a waiver, a taxpayer must send the IRS a Form 872-T, a "Notice of Termination of Special Consent to Extend the Time to Assess Tax." The IRS may terminate the 872-A by mailing to the taxpayer either a form 872-T or a notice of a deficiency in taxes for the relevant tax period. Absent any of these actions, Form 872-A expires when the IRS makes a final assessment, reflecting the final determination of taxes, including any administrative appeals.

When a deficiency is issued by the IRS beyond the ordinary statute of limitations, the IRS bears the burden of showing a valid waiver. *Adler v. Commissioner,* 85

---

[2] A Form 872 or Form 872-A waiver is not a contract, but rather a waiver of a defense by the taxpayer. *Piarulle v. Commissioner,* 80 T.C. 1035, 1042 (1983).

T.C. 535, 540 (1985). When the government can show a facially valid waiver, the burden shifts to the taxpayer to show that the waiver is invalid or somehow limited. The ultimate burden of proof always remains with the taxpayer. *Id.*

Plaintiffs' principle arguments in support of setting aside the waiver are set forth in three discreet grounds. First plaintiffs contend that the court should not construe Form 872-A as providing for an indefinite waiver of the statute of limitations but rather the court should impose an implied condition that the waiver will expire after a "reasonable period of time." However, courts that have addressed the effect of Form 872-A are uniform in holding that Form 872-T is the only method by which a taxpayer can terminate the waiver and that there is no implied condition, either in law or in fact, that the Form 872-A waivers automatically expire of their own violation after a "reasonable period of time." It is, as the government contends, an indefinite waiver. *See St. John v. United States*, 951 F.2d 232, 235 (9th Cir. 1991) (citing authorities).

Second, plaintiffs contend that the waiver is invalid because they did not subjectively understand the nature and scope of the waiver and thus, their waiver was not knowingly made and should not be held against them now. This may or may not be true; but, the tax cases are clear that what the parties subjectively believe or intend is no substitute for what was objectively stated. "[I]t is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not the parties' intentions, that we must take into account in deciding whether the parties have reached an 'agreement' to extend the limitations period." *Ribb v. Commissioner*, T.C.Memo. 1988-379, 55 T.C.M. (CCH) 1597, 1600 (1988) (citing authorities).

Finally, plaintiffs contend that the delay exercised by the government in these matters should operate as an equitable estoppel against the government in assessing any additional taxes or; at minimum, should serve to preclude the assessment of penalties and interest.

Equitable estoppel is a doctrine which precludes one party from asserting a claim or defense against another party who has detrimentally altered her position in reliance on the former's misrepresentation or failure to disclose a material fact. *Portmann v. United States,* 674 F.2d 1155, 1158 (7th Cir. 1982). The Court of Appeals for the Third Circuit along with several other circuits, allows a private party to assert equitable estoppel against the government in a very narrow category of cases—when the traditional elements of estoppel are shown and there is affirmative misconduct on the part of the government. *See United States v. Asmar,* 827 F.2d 907, 911 n. 4 (3d Cir. 1987) (noting that the First, Second, Seventh and Ninth Circuits have adopted tests requiring affirmative misconduct on the part of the government officials).

The traditional elements of equitable estoppel are: 1) misrepresentation by the party against whom estoppel is asserted; 2) reasonable reliance on that misrepresentation by the party asserting estoppel; and 3) detriment to the party asserting estoppel. *Monongahela Valley Hospital, Inc. v. Sullivan,* 945 F.2d 576 (3d Cir. 1991). Although plaintiffs have been quite prolix in their submission to the court, they have placed nothing on the record by which a jury acting reasonably could conclude that the government made any misrepresentation to them in this matter, much less, acted with affirmative misconduct so as to establish equitable estoppel. Plaintiffs seem to contend that the delay, in and of itself, triggers the estoppel application. This contention finds no supportive law.

IV. CONCLUSION

We have fully considered all of plaintiffs' arguments in this matter including those not specifically discussed. Plaintiffs' arguments impress upon the court the egregious of the situation; however, their arguments simply run contrary to established law. Defendant is entitled to judgment as a matter of law.

GARY L. LANCASTER
United States Magistrate Judge

Dated: April 21, 1993

cc: Dina G. McIntyre, Esquire
1609 Lawyers Building
Pittsburgh, PA 15219

Gerard J. Mene, Esquire
Angelo A. Frattarelli, Esquire
U.S. Department of Justice
Tax Division
P.O. Box 227, Ben Franklin Station
Washington, D.C. 20044

26 U.S.C. Section 6501(a) and (c)(4).

§6501. Limitations on assessment and collection

(a) **General Rule.** Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed. . .

* * *

(c) **Exceptions.—**

* * *

(4) **Extension by agreement.**—Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * *

REV. PROC. 79-22.

SECTION 1. PURPOSE.

Rev. Proc. 71-11, 1971-1 C.B. 678, states the conditions under which the Internal Revenue Service will accept Form 872-A, Special Consent to Extend the Time to Assess Tax. The purpose of this Revenue Procedure is to supersede Rev. Proc. 71-11 and to incorporate herein similar conditions with respect to the acceptance of consents on Form 872-A by Appeals officials and, in certain instances, by District Directors of Internal Revenue.

SEC. 2. BACKGROUND.

.01 Present Internal Revenue Service practice provides that consents to extend the period of limitation upon assessment will be secured only in unusual circumstances, to keep to a minimum the number of consents obtained from taxpayers. See Rev. Proc. 57-6, 1957-1 C.B. 729. Service practice also contemplates that the period of any extension obtained shall be limited to the minimum time required for consideration and processing of such cases.

.02 it is often necessary to request extensions of the period of limitation in tax cases to provide adequate time for consideration of disputed issues. Under existing procedures, Form 872, Consent to Extend the Time to Assess Tax, is executed extending the period for assessment to a specified date. It is often difficult, however, to forecast the time required for adequate consideration of a case, particularly where complex or intricate questions of fact or doubtful issues of law are present. As a result, the period of limitation may be extended by use of Form 872 beyond the time required

for Internal Revenue Service consideration, or it may be necessary to request a renewal consent if inadequate time was provided by the first consent.

.03 Form 872-A is provided to relieve taxpayers and the Service from the inconvenience of obtaining renewal consents, to relieve the Service, in part, of the problems of maintaining controls to ensure that the period limitation does not expire during consideration of a case, and to provide a means of restricting the period of limitation to the minimum time required for Service consideration.

SEC. 3. EFFECT OF FORM 872-A.

.01 Form 872-A extends the period of limitation to a date 90 days after (1) mailing by the Internal Revenue Service of written notification to the taxpayer(s) of termination of Service consideration, (2) receipt by the Internal Revenue office considering the case of written notification from the taxpayer(s) of election to terminate the agreement, or (3) mailing by the Internal Revenue Service of a notice of deficiency; except that in the event a notice of deficiency for any such year(s) is sent to the taxpayer(s), the time for making such assessment for the periods stated in the notice of deficiency will expire 60 days after the period during which the making of an assessment is prohibited. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Code will not terminate Form 872-A.

.02 Form 872-A will in no event operate to reduce the time for assessment otherwise provided by law.

.03 Written notification by the Service to the taxpayer of termination of Service consideration will be accomplished by issuance of Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax. Form 872-A provides that 90 days will

thereafter remain for assessment of tax. In this regard, mailing of a notice of deficiency will constitute written notification of termination of Service consideration in lieu of mailing Form 872-T. Receipt from the taxpayer(s) of Form 872-T by the Internal Revenue Service office considering the case will likewise start the running of the 90-day period for assessment.

.04 Form 872-A will be accepted as one properly executed consent covering a parent corporation and any or all of its subsidiary corporations, under the same conditions and procedures as are provided by Revenue Procedure 72-38, 1972-2 C.B. 813, for use of Form 872 in such cases.

.05 The six-month period provided by section 6511(c) of the Internal Revenue Code of 1954 for filing a claim for refund or credit, after expiration of the period for assessment as extended by agreement, is available whether extension is by Form 872-A or by Form 872.

SEC. 4. PROCEDURES.

.01 Form 872-A will be accepted in place of Form 872, either by District Directors of Internal Revenue or their delegates with respect to cases placed in suspense or in which Appeals consideration has been requested, or by Appeals officials with respect to cases under Appeals consideration. Form 872-A will be accepted in other instances when its use would be advantageous to both the taxpayer and the Service.

.02 With the exception of the mailing of a notice of deficiency, written notification by the Service to the taxpayer(s) of termination of Service consideration can only be made using Form 872-T.

.03 Written notification to the Internal Revenue Service from taxpayer(s) of an election to terminate Form

872-A is to be made using Form 872-T Taxpayer(s) should sign and mail Form 872-T in accordance with instructions contained on the form.

.04 Steps taken to terminate Forms 872-A by the Service or the taxpayer(s) other than by using Forms 872-T (e.g., by letter or orally) will not terminate Form 872-A.

.05 If a Form 872-A is for chapter 42 taxes, a separate Form 872-A will be requested from each potential disqualified person or entity that may have been involved in a taxable transaction during the relevant tax year.

.06 Form 872-A will be requested only at the time that Form 872 would normally be requested, in accordance with the policy expressed in Revenue Procedure 57-6.

.07 Form 872 will be accepted in any case in which the taxpayer prefers not to execute Form 872-A. It is anticipated, however, that Form 872-A will be executed in most of the instances for which its use is applicable. Cases involving Form 872-A will receive the same priority handling and expeditious consideration as those involving Form 872.

SEC. 5. EFFECT ON OTHER DOCUMENTS.

Rev. Proc. 71-11 is superseded.

26 CFR 1.451-1(a).

TAXABLE YEAR FOR WHICH ITEMS OF GROSS INCOME INCLUDED

§1.451-1 General rule for taxable year of inclusion.

(a) *General rule.* Gains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer unless includible for a different year in accordance with the taxpayer's method of accounting. **Under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy.** Therefore, under such a method of accounting if, in the case of compensation for services, no determination can be made as to the right to such compensation or the amount thereof until the services are completed, the amount of compensation is ordinarily income for the taxable year in which the determination can be made. Under the cash receipts and disbursements method of accounting, such an amount is includible in gross income when actually or constructively received. Where an amount of income is properly accrued on the basis of a reasonable estimate and the exact amount is subsequently determined, the difference, if any, shall be taken into account for the taxable year in which such determination is made. To the extent that income is attributable to the recovery of bad debts for accounts charged off in prior years, it is includible in the year of recovery in accordance with the taxpayer's method of accounting, regardless of the date when the amounts ere charged off. For treatment of bad debts and bad debt recoveries, see sections 166 and 111 and the regulations thereunder. For rules relating to the treatment of

amounts received in crop shares, see section 61 and the regulations thereunder. For the year in which a partner must include his distributive share of partnership income, see section 706(a) and paragraph (a) of §1.706-1. If a taxpayer ascertains that an item should have been included in gross income in a prior taxable year, he should, if within the period of limitation, file an amended return and pay any additional tax due. Similarly, if a taxpayer ascertains that an item was improperly included in gross income in a prior taxable year, he should, if within the period of limitation, file claim for credit or refund of any overpayment of tax arising therefrom (Emphasis Added).

Form 872-A (Rev. July 1979)	Department of the Treasury — Internal Revenue Service **Special Consent to Extend the Time to Assess Tax**	In reply refer to: E:RPM

GOVERNMENT EXHIBIT 7

Clair B. & Ethel Kinter
(Name(s))

taxpayer(s) of 6670 Estero Blvd., Ft. Meyers, FL
(Number, Street, City or Town, State, ZIP Code)

and the District Director of Internal Revenue or Regional Director of Appeals consent and agree as follows:

(1) The amount(s) of any Federal Income tax due on any return(s) made by or
(Kind of tax)
for the above taxpayer(s) for the period(s) ended 12/31/76
may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

Signature instructions are on the back of this form.
Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

YOUR SIGNATURE HERE → Clair B. Kinter — 1-29-80 *(Date signed)*

SPOUSE'S SIGNATURE → Ethel Kinter — 1-29-80 *(Date signed)*

TAXPAYER'S REPRESENTATIVE SIGN HERE → ——— *(Date signed)*

CORPORATE NAME → ———

CORPORATE OFFICER(S) SIGN HERE → ——— *(Title)* ——— *(Date signed)*

→ ——— *(Title)* ——— *(Date signed)*

INTERNAL REVENUE SERVICE AUDIT DIVISION RECEIVED FEB 4 1980 CLASSIFICATION PITTSBURGH, PA.

THOMAS L. DAVIS
DISTRICT DIRECTOR OF INTERNAL REVENUE

BY Stanley P. Short Revenuer
(Signature and Title)

REGIONAL DIRECTOR OF APPEALS
3/18/80
(Date signed)

Form 872-A (Rev. 7-79)

IRS FORMS 872A.

A21

Form 872-A (Rev. July 1979)	Department of the Treasury - Internal Revenue Service **Special Consent to Extend the Time to Assess Tax**	In reply refer to: E:RPM

GOVERNMENT EXHIBIT 8

Royden E. & Mary Kinter
(Name(s))

taxpayer(s) of 974 Marion Road, Indiana, PA 15701
(Number, Street, City or Town, State, ZIP Code)

and the District Director of Internal Revenue or Regional Director of Appeals consent and agree as follows:

(1) The amount(s) of any Federal Income tax due on any return(s) made by or
(Kind of tax)
for the above taxpayer(s) for the period(s) ended December 31, 1976,
may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

Signature instructions are on the back of this form.
Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

YOUR SIGNATURE HERE →	Royden E. Kinter	3-30-80 *(Date signed)*
SPOUSE'S SIGNATURE →	Mary Kinter	3/30/80 *(Date signed)*
TAXPAYER'S REPRESENTATIVE SIGN HERE →		*(Date signed)*
CORPORATE NAME →		
CORPORATE OFFICER(S) SIGN HERE →	*(Title)*	*(Date signed)*
	(Title)	*(Date signed)*

INTERNAL REVENUE SERVICE AUDIT DIVISION RECEIVED APR 4 1980 CLASSIFICATION PITTSBURGH, PA.

THOMAS L. DAVIS
DISTRICT DIRECTOR OF INTERNAL REVENUE

REGIONAL DIRECTOR OF APPEALS

BY Stanley P. Shost Reviewer
(Signature and Title)

4/7/80
(Date signed)

Form 872-A (Rev. 7-79)

A23

Form 872-A (Rev. July 1979)	Department of the Treasury – Internal Revenue Service **Special Consent to Extend the Time to Assess Tax**	In reply refer to: E:RPM

Clair B. & Ether Kinter

(Name(s))

taxpayer(s) of RD 1, Marion Center, Pennsylvania 15759

(Number, Street, City or Town, State, ZIP Code)

GOVERNMENT EXHIBIT 9

and the District Director of Internal Revenue or Regional Director of Appeals consent and agree as follows:

(1) The amount(s) of any Federal Income tax due on any return(s) made by or
(Kind of tax)
for the above taxpayer(s) for the period(s) ended December 31, 1975,
may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

Signature instructions are on the back of this form.
Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

YOUR SIGNATURE HERE → Clair B. Kinter — 9-23-80 *(Date signed)*

SPOUSE'S SIGNATURE → Ether B. Kinter — 9-20-80 *(Date signed)*

TAXPAYER'S REPRESENTATIVE SIGN HERE → ——— *(Date signed)*

CORPORATE NAME → ———

CORPORATE OFFICER(S) SIGN HERE → ——— *(Title)* *(Date signed)*

→ ——— *(Title)* *(Date signed)*

INTERNAL REVENUE SERVICE AUDIT DIVISION RECEIVED SEP 29 1980 CLASSIFICATION

THOMAS L. DAVIS
DISTRICT DIRECTOR OF INTERNAL REVENUE

BY John A. Niederst, RPM
(Signature and Title)

REGIONAL DIRECTOR OF APPEALS
9-30-80
(Date signed)

Form 872-A (Rev. 7-79)

A25

Form 872-A
(Rev. July 1979)

Department of the Treasury — Internal Revenue Service

Special Consent to Extend the Time to Assess Tax

Royden E & Mary Kinter
(Name(s))

taxpayer(s) of Marion Center, PA 15759
(Number, Street, City or Town, State, ZIP Code)

RECEIVED
OCT 8 1980
CLASSIFICATION

and the District Director of Internal Revenue or Regional Director of Appeals consent and agree as follows:

(1) The amount(s) of any Federal Income tax (Kind of tax) due on any return(s) made for for the above taxpayer(s) for the period(s) ended December 31, 1977 may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the agreement mails Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

Signature instructions are on the back of this form.
Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

YOUR SIGNATURE HERE → Royden E Kinter — Sept. 30 1980 (Date signed)

SPOUSE'S SIGNATURE → Mary Kinter — Sept 30 1980 (Date signed)

TAXPAYER'S REPRESENTATIVE SIGN HERE → ---------- (Date signed)

GOVERNMENT EXHIBIT 10

CORPORATE NAME → ----------

CORPORATE OFFICER(S) SIGN HERE → ---------- (Title) ---------- (Date signed)
→ ---------- (Title) ---------- (Date signed)

THOMAS L. DAVIS
DISTRICT DIRECTOR OF INTERNAL REVENUE

BY John A. Nuidert, RPM
(Signature and Title)

REGIONAL DIRECTOR OF APPEALS

10-8-80
(Date signed)

Form 872-A (Rev. 7-79)

Exhibit D.

A27

Form 872-A
(Rev. July 1979)

Department of the Treasury — Internal Revenue Service

Special Consent to Extend the Time to Assess Tax

In reply refer to: E:ERM

GOVERNMENT EXHIBIT 11

ROYDEN E. & MARY KINTER
(Name(s))

taxpayer(s), of MARION CENTER, PA 15759
(Number, Street, City or Town, State, ZIP Code)

and the District Director of Internal Revenue or Regional Director of Appeals consent and agree as follows:

(1) The amount(s) of any Federal INCOME tax due on any return(s) made by or
(Kind of tax)
for the above taxpayer(s) for the period(s) ended DECEMBER 31, 1975
may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

Signature instructions are on the back of this form.
Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

YOUR SIGNATURE HERE → Royden E. Kinter — 10-8-80 (Date signed)

SPOUSE'S SIGNATURE → Mary Kinter — (Date signed)

TAXPAYER'S REPRESENTATIVE SIGN HERE → — (Date signed)

CORPORATE NAME → — (Title) — (Date signed)

CORPORATE OFFICER(S) SIGN HERE → — (Title) — (Date signed)

INTERNAL REVENUE SERVICE AUDIT DIVISION RECEIVED OCT 14 1980 CLASSIFICATION PITTSBURGH, PA.

THOMAS L. DAVIS
DISTRICT DIRECTOR OF INTERNAL REVENUE

REGIONAL DIRECTOR OF APPEALS

BY John A. Niederst RCA — 10-17-80 (Date signed)
(Signature and Title)

Form 872-A (Rev. 7-79)

Exhibit C

(2)

Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

No. 93-2032

In the Supreme Court of the United States

OCTOBER TERM, 1994

CLAIR B. KINTER AND ROYDEN E. KINTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

RICHARD FARBER
S. ROBERT LYONS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

13 pp

QUESTIONS PRESENTED

1. Whether the indefinite waivers of the statute of limitations for assessment executed by petitioners in 1980 with respect to their taxable years 1974, 1975, and 1977 were valid, thereby allowing the assessment of additional taxes for those years beyond the normal limitations period.

2. Whether summary judgment was properly granted to the United States with respect to petitioners' claim that certain income received by their partnership in 1975 was taxable to them in 1974 rather than in 1975.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Amesbury Apartments, Ltd. v. *Commissioner*, 95 T.C. 227 (1990)	6
Anastasato v. *Commissioner*, 894 F.2d 884 (3d Cir. 1986)	8
Aronson v. *Commissioner*, 62 T.C.M. (CCH) 1109 (1991), aff'd, 989 F.2d 105 (2d Cir. 1993)	7
Conway v. *Commissioner*, 60 T.C.M. (CCH) 1260 (1990)	7
Estate of Camara v. *Commissioner*, 91 T.C. 957 (1988)	6, 8
Florsheim Bros. Drygoods Co. v. *United States*, 280 U.S. 453 (1930)	6
Harber v. *Commissioner*, 64 T.C.M. (CCH) 1510 (1992)	7
Helvering v. *Taylor*, 293 U.S. 507 (1935)	8
Kernen v. *Commissioner*, 902 F.2d 17 (9th Cir. 1990)	7
Kinsey v. *Commissioner*, 859 F.2d 1361 (9th Cir. 1988), cert. denied, 489 U.S. 1083 (1989)	8
Kronish v. *Commissioner*, 90 T.C. 684 (1988)	6, 7
Piarulle v. *Commissioner*, 80 T.C. 1035 (1983)	6, 7
Pictorial Printing Co. v. *Commissioner*, 38 F.2d 563 (7th Cir. 1930)	7
Pursell v. *Commissioner*, 38 T.C. 263 (1962), aff'd, 315 F.2d 629 (3d Cir. 1963)	6
Ribb v. *Commissioner*, 55 T.C.M. (CCH) 1597 (1988)	7
St. John v. *United States*, 951 F.2d 232 (9th Cir. 1991)	7
Schulman v. *Commissioner*, 93 T.C. 623 (1989)	6-7
Stange v. *United States*, 282 U.S. 270 (1931)	6

Cases—Continued:

	Page
Stenclik v. *Commissioner*, 907 F.2d 25 (2d Cir.), cert. denied, 498 U.S. 984 (1990)	7
United States v. *Janis*, 428 U.S. 433 (1976)	8
Wall v. *Commissioner*, 875 F.2d 812 (10th Cir. 1989)	7-8
Welch v. *Helvering*, 290 U.S. 111 (1933)	8
Woods v. *Commissioner*, 92 T.C. 776 (1989)	7

Statutes:

Internal Revenue Code (26 U.S.C.):	
§ 6501	5
§ 6501(a)	5
§ 6501(c)(4)	5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-2032

CLAIR B. KINTER AND ROYDEN E. KINTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 22 F.3d 301 (Table). The order of the district court (Pet. App. A3) and the report and recommendation of the Magistrate Judge (Pet. App. A7-A13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1994. The petition for a writ of certiorari was filed on June 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1974 through 1977, petitioners Clair Kinter and Royden Kinter each owned a 50% interest in Marion Center Mining Company (MCM), a strip-mining partnership. In 1975, petitioners each purchased a 9.9% interest in DTAS, a limited partnership formed in 1975 to purchase an Italian movie entitled "Down the Ancient Staircase" (C.A. App. 401a).

Petitioners filed timely income tax returns for 1974, 1975 and 1976. Those returns were audited by the Internal Revenue Service. On audit, the Commissioner disallowed various deductions claimed by MCM. Notices of deficiency in 1974 taxes were thereafter issued to petitioners, who then filed a petition in the Tax Court for redetermination of the asserted deficiencies. While 1974 was the only year before the Tax Court on that petition, the same deduction challenged by the IRS for 1974 also affected petitioners' 1975, 1976 and 1977 tax years. The IRS therefore suspended further action on the audits and forwarded for petitioners' signature proposed form waivers of the statute of limitations for those years (Pet. App. A8).

In 1980, petitioners each signed a Form 872-A, Special Consent to Extend the Time to Assess Tax, for the year 1976 (Pet. App. A8, A21, A23). The Forms 872-A were signed on behalf of the Secretary of the Treasury by a duly authorized delegate. These agreements specified that the amount of any federal income tax for 1976 could be assessed on or before the 90th day after (*id.* at A21, A23):

> (a) the Internal Revenue Service office considering the case receive[d] Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or

(b) the Internal Revenue Service mail[ed] Form 872-T to the taxpayer(s); or

(c) the Internal Revenue Service mail[ed] a notice of deficiency for such period(s).

2. On September 12, 1980, the IRS and petitioners' attorney entered into a stipulation regarding the pending Tax Court case for petitioners' 1974 tax year. That stipulation was based on a determination that the deductions claimed by MCM for 1974 were valid. Shortly after entry of the stipulated decision, petitioner Clair Kinter signed a Form 872-A for 1975 and petititoner Royden Kinter signed Forms 872-A for 1975 and 1977 (Pet. App. A25, A27, A29; C.A. App. 114a, 117a, 118a, 119a).[1]

The audit of petitioners' 1975 and 1977 tax returns was reactivated in 1987 (Pet. App. A8). In 1988 and 1989, the IRS determined deficiencies in petitioners' taxes for 1974 and 1975 and in petitioner Royden Kinter's taxes for 1977 (*ibid.*; C.A. App. 10a, 56a, 216a-221a, 222a, 238a-243a).[2] These deficiency determinations were based, among other things, upon (i) disallowance of loss deductions petitioners had claimed with respect to their investment in DTAS and (ii) petitioners' failure to

---

[1] In 1978, petitioners each signed a Form 872, Consent Fixing Period of Limitation Upon Assessment of Tax, which extended the period for assessing their 1975 taxes until December 31, 1980 (C.A. App. 110a, 111a). The validity of the Form 872 signed in 1978 is not at issue in this case.

[2] The 1974 tax year remained open because the deficiency resulted from a net operating loss carried back from 1976, a year for which Forms 872-A had been executed (C.A. App. 115a, 116a). Under the stipulated Tax Court decision for 1974, the IRS remained free to assess a deficiency for 1974 if a net operating loss had been erroneously carried back to that year (*id.* at 114a).

include in their income for 1975 the amount of $74,750 received by MCM from sales during that year.

3. Petitioners paid the tax and interest due and filed refund actions in district court. Petitioners asserted that the assessments were barred by the statute of limitations because (i) the Forms 872-A they executed had expired before these assessments were made and (ii) the Forms 872-A were void *ab initio* because petitioners did not fully understand the terms of their waiver at the time they executed the forms.

The magistrate judge filed a report recommending that summary judgment be granted to the government (Pet. App. A7-A13). The magistrate first rejected petitioners' argument that the Forms 872-A expired under its terms upon the lapse of a "reasonable * * * time" (*id.* at A11):

> [C]ourts that have addressed the effect of Form 872-A are uniform in holding that Form 872-T is the only method by which a taxpayer can terminate the waiver and that there is no implied condition, either in law or in fact, that the Form 872-A waivers automatically expire of their own violation after a "reasonable period of time." It is, as the government contends, an indefinite waiver.

The magistrate also rejected petitioners' alternative claim that the waivers were "invalid because they did not subjectively understand the nature and scope of the waiver" (*ibid.*):

> [T]he tax cases are clear that what the parties subjectively believe or intend is no substitute for what was objectively stated. "[I]t is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not the parties' intentions, that we must take into account in deciding whether the

> parties have reached an 'agreement' to extend the limitations period."

The district court adopted the report and recommendation of the Magistrate (Pet. App. A3, A6). The court of appeals affirmed without opinion (*id.* at A1-A2).

ARGUMENT

The decision in this case is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The statutory period of limitations on the assessment of tax is contained in 26 U.S.C. 6501. In general, except as otherwise provided in that Section, the Commissioner may assess the amount of an internal revenue tax payable by return "within 3 years after the return was filed" (26 U.S.C. 6501(a)). The statute further provides, as an exception to its general rule, that the Commissioner and the taxpayer may agree to extend the normal three-year limitations period (26 U.S.C. 6501(c)(4)):

> Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, * * * both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

The IRS uses two forms for waivers of the statute of limitations. The first type of waiver, Form 872, expires on a stated date. The second type, Form 872-A, waives the statute of limitations for an indefinite period of time.

The taxpayer may, however, terminate a Form 872-A agreement at will by mailing a Form 872-T to the appropriate office of the IRS.

An agreement by a taxpayer consenting to an extension of the statutory period of assessment is not a contract. It is "a voluntary, unilateral waiver of a defense by the taxpayer." *Stange* v. *United States*, 282 U.S. 270, 276 (1931). See also *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U.S. 453 (1930). Because Section 6501(c)(4) "refers only to time, and leaves the parties free to decide for themselves the terms on which an extension will be granted" (*Pursell* v. *Commissioner*, 38 T.C. 263, 278 (1962), aff'd per curiam, 315 F.2d 629 (3d Cir. 1963)), however, contract principles remain significant. *Estate of Camara* v. *Commissioner*, 91 T.C. 957, 959 (1988); *Kronish* v. *Commissioner*, 90 T.C. 684, 693 (1988); *Piarulle* v. *Commissioner*, 80 T.C. 1035, 1042 (1983).

Petitioners' primary contention (Pet. 10-13) is that the waivers of the statute of limitations executed by them were void *ab initio* because in executing the Forms 872-A they did not understand that the limitations period would remain open indefinitely until they acted to terminate the waiver agreement by filing a Form 872-T with the IRS. There is no authority for petitioners' assertion. A taxpayer who executes a plain and unambiguous written agreement to extend the statute of limitations on assessment may not challenge his waiver on the grounds that he did not fully understand the consequences of his undertaking. A taxpayer is bound by the objective terms of his extension agreement; any asserted, subjective misunderstanding of those terms by the taxpayer is not relevant. See *Amesbury Apartments, Ltd.* v. *Commissioner*, 95 T.C. 227, 241 (1990); *Schulman* v. *Commissioner*, 93 T.C. 623,

639 (1989); *Woods* v. *Commissioner*, 92 T.C. 776, 780 (1989); *Kronish* v. *Commissioner*, 90 T.C. 684, 693 (1988); *Piarulle* v. *Commissioner*, 80 T.C. 1035, 1042 (1983); *Harber* v. *Commissioner*, 64 T.C.M. (CCH) 1510, 1512-1513 (1992); *Aronson* v. *Commissioner*, 62 T.C.M. (CCH) 1109, 1113 (1991), aff'd, 989 F.2d 105 (2d Cir. 1993); *Conway* v. *Commissioner*, 60 T.C.M. (CCH) 1260, 1262 (1990); *Ribb* v. *Commissioner*, 55 T.C.M. (CCH) 1597, 1600 (1988).

2. Petitioners contend in the alternative (Pet. 15-19) that the indefinite term of their Form 872-A waivers expired before the assessments were made because such a waiver is valid only for "a reasonable period of time." The courts have consistently rejected that contention. By its terms, a Form 872-A continues in effect until terminated by either the taxpayer or the IRS in one of the methods prescribed therein. Because the taxpayer may terminate a Form 872-A agreement at will, simply by sending a Form 872-T to the IRS, the courts have concluded that there is no basis for grafting an implied limitation on its duration. Instead, it has consistently been held that Form 872-T is the taxpayer's *exclusive* method of terminating the waiver and that the waiver does not impliedly terminate after a "reasonable time."[3] See *St. John* v. *United States*, 951 F.2d 232, 235 (9th Cir. 1991); *Kernen* v. *Commissioner*, 902 F.2d 17 (9th Cir. 1990); *Wall* v. *Commissioner*, 875 F.2d 812 (10th Cir.

---

[3] The 1930 decision in *Pictorial Printing Co.* v. *Commissioner*, 38 F.2d 563 (7th Cir.), on which petitioners rely (Pet. 18), is inapposite. The extension agreement involved in that case differed from the modern Form 872-A agreements in that it did not provide any means for the taxpayer to terminate the agreement. The analysis of *Pictorial Printing Co.* is therefore inapplicable to this case. See *Stenclik* v. *Commissioner*, 907 F.2d 25, 28 (2d Cir.), cert. denied, 498 U.S. 984 (1990).

1989); *Kinsey* v. *Commissioner*, 859 F.2d 1361, 1362-1364 (9th Cir. 1988), cert. denied, 489 U.S. 1083 (1989); *Estate of Camara* v. *Commissioner*, 91 T.C. 957 (1988).

3. Petitioners further contend (Pet. 24-28) that the award of summary judgment to the government on the merits of the underlying tax dispute was improper. Petitioners failed, however, to bring forth evidence to support their assertion that the sum of $74,750 received by the MCM partnership in 1975 was taxable to petitioners in 1974 (as petitioners assert) rather than in 1975 (as the assessment determined). Petitioners contend that MCM was an accrual basis partnership and that the amount in question was earned in 1974 even if not received until 1975. Petitioners did not, however, produce any books or records to support this claim (Pet. 25). It was petitioners' burden to establish that they had overpaid their taxes for 1975 and were entitled to a refund. See *United States* v. *Janis*, 428 U.S. 433, 441 (1976); *Helvering* v. *Taylor*, 293 U.S. 507, 515 (1935); *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); *Anastasato* v. *Commissioner*, 794 F.2d 884, 886 (3d Cir. 1986). Because the receipt of income is a sufficient evidentiary basis to support an assessment of tax, summary judgment was properly granted to the United States. In any event, this inherently factual issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

RICHARD FARBER
S. ROBERT LYONS
Attorneys

AUGUST 1994